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Attorneys for  
FARMERS INVESTMENT COMPANY

IN THE SUPREME COURT OF THE STATE OF ARIZONA

En Banc

FARMERS INVESTMENT COMPANY,  
a corporation,

Appellant,

v.

ANDREW L. BETTWY, as State Land  
Commissioner, and the STATE LAND  
DEPARTMENT, a Department of the  
State of Arizona, and PIMA MINING  
COMPANY, a corporation,

Appellees.

FARMERS INVESTMENT COMPANY,  
a corporation,

Appellant,

v.

THE ANACONDA COMPANY, a corpora-  
tion; AMAX COPPER MINES, INC.,  
THE ANACONDA COMPANY, as partners  
in and constituting ANAMAX MINING  
COMPANY, a partnership,

Appellees.

CITY OF TUCSON, a municipal  
corporation,

Appellant,

v.

ANAMAX MINING COMPANY, and DUVAL  
CORPORATION and DUVAL SIERRITA  
CORPORATION,

Appellees.

...

FILED  
NOV 10 1976  
CLIFFORD H. WARD  
CLERK SUPREME COURT  
BY *Clifford H. Ward*

NO. 11439-2

MEMORANDUM ON "JOINT  
MOTION TO STRIKE  
FICO'S PROPOSAL"

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1 The implication which stands out from between the lines of  
2 the Motion to Strike is that FICO's proposal was not a good  
3 faith proposal -- it was a ploy designed to bring improper  
4 matters to the Court's attention. A short response is therefore  
5 justified. We will be brief.

6 THE COURT'S JURISDICTION

7 In movants' haste in scurrying about to find some colorable  
8 excuse for not responding on the merits to FICO's proposal, they  
9 entirely overlooked the fact that the views of Messrs. Chandler-  
10 Udall, et al., upon the question of "jurisdiction of appellate  
11 courts" have not as yet been generally accepted as persuasive by  
12 most courts. No other authority supporting the views expressed  
13 as to this Court's jurisdiction is offered. Apparently, movants  
14 have never read the Arizona Supreme Court case of Wilhorn Builders  
15 v. Cortaro Management Company, 82 Ariz. 48, 308 P.2d 251 (1957).

16 In that case, this Court stated:

17 "Both appellant and appellee (hereinafter re-  
18 ferred to as buyer and seller respectively)  
19 have filed motions for rehearing or for modifica-  
20 tion of the decision of this court. The motions  
21 for rehearings are denied. All material issues  
22 were decided in the original opinion that could  
23 have been determined and the cause was remanded to  
24 the trial court for it, upon a new trial, to decide  
25 the issues we are now called upon to decide. Coun-  
26 sel for buyer expressly urged in its briefs that the  
27 cause be remanded for trial on the original complaint  
28 in the event we reached the conclusion that seller,  
29 by filing its original complaint, had conclusively  
30 elected its remedy or to exercise its substantive  
31 right to treat the contract with buyer as con-  
32 tinuing and to limit its relief to recovery of

1 the amount then due. It is quite patent that  
2 the issues we are now requested to decide be-  
3 came material only after our original opinion  
4 was handed down.

5 "As a reason for seeking a full determination  
6 by us of all issues in the case, including  
7 those which have become material as a result  
8 of our opinion, counsel urge that all the  
9 facts are before us and that our acceptance  
10 of the task will save a large expense in the  
11 retrial of the case in the lower court and  
12 prevent a prolixity of litigation. Upon this  
13 basis we will consider the issues now remaining  
14 to be settled." [Emphasis added.]

15 The New Jersey Court stated in E & K Agency, Inc. v.  
16 Van Dyke, 286 A.2d 706, 709 (1972):

17 "In the exercise of its appellate jurisdiction  
18 a reviewing court has the power and indeed the  
19 duty to make such ultimate disposition of a  
20 case as justice requires."

21 \* \* \*

22 "Appellate courts of this State, in line with  
23 those of many others, have recognized the  
24 responsibility of appellate review as including  
25 a requirement that the ultimate disposition of  
26 a case be just, not only as to parties directly  
27 before the reviewing court but also as to  
28 others who will perforce be affected by the  
29 action of the court. This solicitude has been  
30 expressly extended to parties to the litigation  
31 who have not appealed but who in all justice  
32 . . .



1 should be afforded the benefits of the upper  
2 court ruling."

3 In 5(B), C.J.S., Sec. 1835, p. 224, 225 (Appeal and Error),  
4 the rule is stated:

5 "An appellate court generally possesses by  
6 virtue of inherent power and in some states by  
7 virtue of express statutory authority, broad  
8 powers and discretion with respect to the  
9 scope of its decision and the relief to be  
10 granted, and broadly speaking, any decision may  
11 be made in a case that its proper disposition  
12 requires. Ordinarily, after reviewing and  
13 deciding the controlling questions of a case,  
14 the appellate court may dispose of the cause,  
15 as distinguished from the appeal, by affirmance,  
16 modification, or reversal, and by the rendition  
17 of final judgment or the remanding of the cause  
18 to the lower court for a new trial, entry of  
19 judgment, or other proceedings." [Emphasis added.]

20 See also: 5(B), C.J.S., Sec. 1837, (b), pp. 241, 242;  
21 5 Am.Jur.2d, Sec. 711, p. 157 (Appeal and Error); 5 Am.Jur.2d  
22 Sec. 899, p. 336.

23 As is evidenced by Am.Jur.2d and C.J.S. above referenced,  
24 appellate courts, in their discretion, will give consideration  
25 to stipulations and requests of the parties and, if approved,  
26 implement them. That this court is not circumscribed by  
27 technical limitations upon its power in making disposition of  
28 matters before it on appeal is elementary, both by reason of  
29 statutes (Section 12-2103, A.R.S.) and by reason of its inherent  
30 power.

31 . . .  
32 . . .

FICO'S PROPOSAL

FICO assumed, in drafting and presenting its proposal, that counsel for appellees and Tucson were familiar with the rule perhaps best explicated in Spector v. McFate, 95 Ariz. 88, 387 P.2d 234, to the effect that the trial court, upon remand, may not depart "one jot or tittle" from the mandate directive of this Court. Rather than compromise "discussions", FICO's proposal represented an offer by a prevailing party to an appeal to join with the losing parties in a request that this Court allow appellees and Tucson (the losing parties) some leeway in adjusting to the Court's decision, provided appellees and Tucson would make a good faith attempt to utilize all available sources of water to replace the groundwater being now illegally used by them.

That appellees and Tucson intend to continue in their disregard of the law governing use of groundwater, as declared by this Court, by pumping and transporting it from within a Critical Groundwater Area to a place outside the critical area, is implicit in the language of the Motion to Strike. Indeed, there is no other explanation for the thin and transparent excuses advanced for not responding to the merits of the proposal.

In Bristor II, the record shows that the defendants there pumped and transported groundwater a distance of three miles from the sites of their wells. The Court said plainly that this was an unlawful use, since plaintiffs in that case were damaged thereby. In Jarvis I this Court held that as a matter of law such removal of groundwater from a critical area damaged other users in the area. Each of the mining companies and the City of Tucson pump and transport groundwater from within the Sahuarita-Continental Critical Area over three miles to the place of its use outside the area -- Duval - over seven miles.

1 Yet they urge the need for further "evidentiary hearings".  
2 Appellees and Tucson say that they cannot "in propriety even on  
3 this Motion, address the merits of the FICO proposal. . . ."  
4 It is indeed regrettable that this "shrinking violet" sense of  
5 propriety so primly stated by the mining companies and Tucson  
6 cannot be extended by them to their continuing unlawful use of  
7 groundwater, which smacks a bit of taking and using property  
8 of another and which this Court has plainly said and plainly  
9 reiterated is wrongful.

10 All FICO asked, in exchange for its stipulation, was that  
11 its adversaries agree to abide by the law as plainly stated by  
12 this Court. To take refuge behind the rule of evidence that  
13 settlement negotiations are not admissible in evidence as a rea-  
14 son for not meeting FICO's proposal fairly and upon the merits is  
15 at most a transparent excuse for not doing so and is clear evi-  
16 dence of movants' inability and unwillingness to do so upon any  
17 meaningful basis.

18 It will soon be six years since FICO filed its Superior  
19 Court suit alleging the law to be what this Court has on this  
20 appeal again confirmed to be the governing principles applicable  
21 to use of Arizona groundwater. Countless pages of depositions,  
22 interrogatories, motions and arguments fill the void.

23 Movants say:

24 "The so-called 'Proposal' is another effort  
25 by FICO to avoid a determination of the legal  
26 issues. There has never been a trial. FICO  
27 has consistently attempted to short cut evi-  
28 dential hearings in order to have the case  
29 decided in a factual void."

30 Just what evidential facts remain unsettled is unclear. One  
31 thing is clear. So long as "evidential" hearings can be insisted  
32 upon and prolonged, the mines and Tucson continue to illegally



1 pump the groundwater of the Sahuarita-Continental Critical  
2 Groundwater Area.

3 How the City of Tucson and its officials can justify  
4 rejection of FICO's offer to refrain from taking action to stop  
5 its (Tucson's) present illegal transportation of groundwater from  
6 the Critical Area and also to join in urging the Court to stay  
7 the injunction against present uses of this water by Tucson  
8 until Central Arizona Project water is available, asking only  
9 that Tucson press its claims to Colorado River Water, defies  
10 logical explanation.

11 CONCLUSION

12 In view of the position of the mining companies and the  
13 City of Tucson, FICO respectfully urges that the Court consider  
14 and rule upon the pending matters at its first convenience.

15 RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of November, 1976.

16 SNELL & WILMER

17 Loren W. Counce, Jr.  
18 Mark Wilmer

19 By Mark Wilmer  
20 Mark Wilmer

21  
22 COPY of the foregoing mailed  
23 this 11<sup>th</sup> day of November,  
24 1976, to:

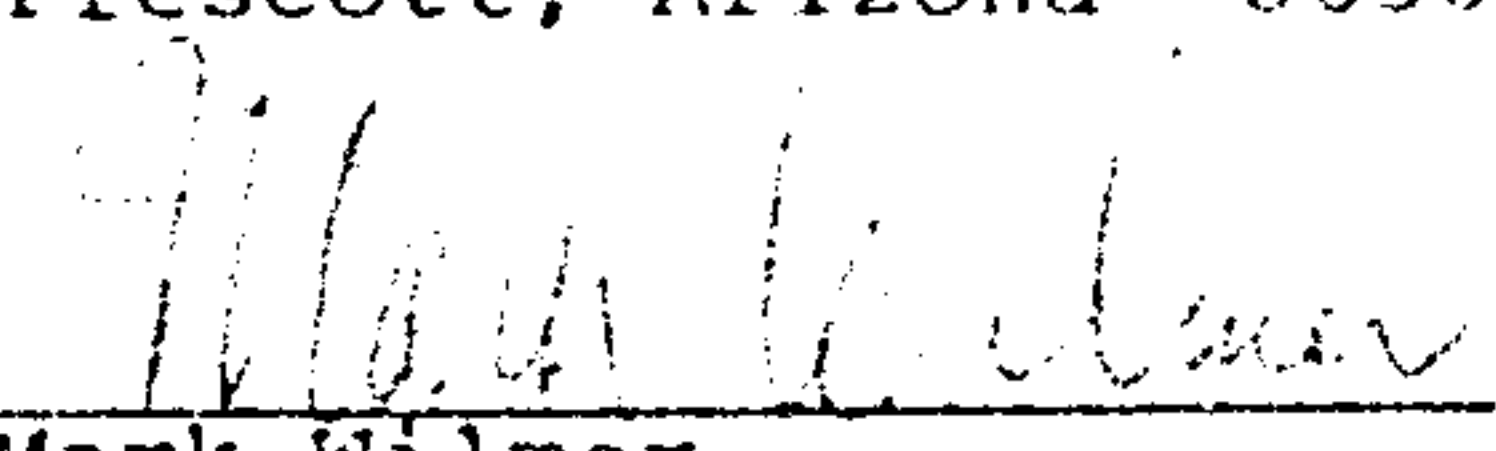
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